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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 232.

RETAIL STORE EMPLOYEES UNION LOCAL 954,

Petitioner,

v.

LANE DRUG COMPANY,
a Division of A. C. Israel Commodity Corporation, Lane's of Sylvania, Inc., Lane's of Bowling Green, Inc. and Lane's of Oregon, Inc.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals For the Sixth Circuit.

Petitioner, Retail Store Employees Union Local 954, petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit wherein it granted a petition for review and refused to enforce that part of an order of the National Labor Relations Board which directed respondent Lane Drug Company and affiliated Companies to bargain with petitioner.

OPINIONS BELOW.

The opinion of the Court of Appeals (Appendix A, pp. 1a to 15a) is not yet reported officially. The Board's decision and order, including the Trial Examiner's decision, are reported at 160 NLRB 1147 (Appendix B, pp. 15a-80a).

JURISDICTION.

The opinion of the Court of Appeals was entered on March 29, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Where enforcement is sought of a National Labor Relations Board order requiring an employer to bargain with a union whose majority is based upon authorization cards, and where it is found that the employer committed acts of interference, restraint, and coercion designed to undermine the union and also refused to submit to an impartial card check when there was no issue as to the validity and purpose of the authorization cards, are these factors legally sufficient to meet the substantial evidence test to prove the employer's lack of good faith doubt as to the Union's majority?

2. Where enforcement is sought of a National Labor Relations Board order requiring an employer to bargain with a union whose majority is based upon authorization cards, and when the Board finds undisputed probative evidence of the employer's lack of good faith doubt, may a reviewing court rely upon separate factors in the case to assess and weigh the evidence to set aside the Board's order?

STATUTE INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. 151, et seq., are set forth in Appendix C, p. 81a.

STATEMENT OF THE CASE.

Professional pharmacists in 17 drug stores operated by the Lane Drug Company in Toledo, Ohio, and vicinity began a campaign in late 1964 and early 1965 to consider the possibilities of unionization. One of their number, William A. Nupp, assumed the leadership in this campaign. After Nupp was dissuaded for a short time by employer promises, the campaign was renewed in April 1965. A committee of pharmacists discussed possible unionization with two other unions before seeking the unsolicited aid of petitioner in this case. The pharmacists' committee, led by Nupp, arranged for a representative of petitioner to attend a meeting held on April 28, 1965, for the purpose of explaining the benefits of unionization to assembled pharmacists, and acting upon possible organization. On the eve of the meeting, Nupp was fired by the employer for his activity in behalf of unionization, as found by the Board and upheld by the Court of Appeals.

At the April 28 meeting, union representative Leedy told the pharmacists that the union would not seek an election but would use the signed membership cards of the pharmacists to pursue a demand for recognition and bargaining (J.A. 96a). There was never any claim or contention made as to any invalidity of any of the cards signed, or that they were executed for any other purpose than seeking recognition and bargaining. On the following day, after the union had secured sixteen signed authorization cards, it made its first demand upon the employer for recognition. The trial examiner found that the union possessed a majority of 16 out of 31 pharmacists in the unit on that date, but the Board included an additional pharmacist in the unit and found that no majority existed on April 29. However, the union campaign continued, and by May 4, 1965, one more authorization card had

been secured. On this date, a second demand was made upon the employer for recognition along with an offer to submit the union's majority claim to the Toledo Labor-Management-Citizens Committee for verification. The examiner, the Board and Court below all found that on May 4, 1965, the union did possess a majority of 17 pharmacists in the unit. Two additional cards were secured by the pharmacists within the next few days, increasing the count to 19 out of 32.

The trial examiner found, and the Board agreed, that the employer violated Section 8(a)(1) of the Act by coercively interrogating employees, promising them economic benefits, enlisting employees to engage in surveillance, acting to dissuade other employees from supporting the union, soliciting employees to deal directly with the employer instead of through a union bargaining representative, and threatening them with economic detriment for continuing their union affiliation or collective bargaining endeavors (J.A. 606a).

The Court of Appeals rejected only this part of the Board's finding as to unlawful interrogation. The Court, in affirming the remaining violations of Section 8(a)(1), stated:

> The pharmacists were, however, promised benefits if they would deal with the employer directly * * *. They were asked to prevail on other employees to deal directly with the employer. The employer told pharmacists that he would not deal with the union. The employer's conduct, in our opinion, constituted interference of the employees' right to organize, guaranteed under Section 7.

The examiner, upheld by the Board, made a series of devastating findings in rejecting the employer's claim of good faith doubt as to the union majority. The employer

interposed the defense that it doubted the appropriateness of the bargaining unit. Yet the employer filed a representation petition, in which he detailed the same unit found by the examiner to be appropriate (J.A. 583a), and even designated the numerical composition as low as 25 (J.A. 490a). The employer only contended that it had doubt of the numerical majority—never the bona fides of the authorizations of any of those who signed for the union to represent them. The examiner pointed out that the employer spurned the union's express offer to establish proof of its majority status through the good offices of the Toledo Labor Management Citizens Committee (J.A. 584a).[1]

The examiner further pointed out that a letter from the employer's president to all pharmacists showed "the true cast of respondent's thinking to be that in refusing to recognize, meet or bargain with the union, respondents were not motivated by doubt as to the union's representative status, but rather unwillingness to deal with the union even if it did in fact represent its pharmacists."

The examiner further found that Kaye, the operational vice president of the employer, told one of the pharmacists that he knew there were 19 signatures for the union and the company only had 10 against (J.A. 548a). It was also found that another supervisor told the same pharmacist that the company knew that the count of the votes stood at 19 to 10 with 19 of the pharmacists for the union and 10 against (J.A. 549a). (This evidence alone, if credited—as it was by the Board and never contradicted—should be sufficient to resolve any issue

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[1] The role of the Toledo L-M-C is well known to this Court and the Sixth Circuit in its efforts to bring labor peace to the community. See *Retail Clerks International Association v. Lion Dry Goods Company*, 369 U.S. 17.

about good faith doubt of the union's majority.) The examiner further found that Kaye had told the pharmacist that "those who signed (union) cards don't mean anything, and we have plenty of time with your help * * * to change those signatures." (J.A. 552a). His testimony was credited by the examiner, upheld by the Board, and likewise never contradicted.

The examiner also found that Kaye told pharmacist Maza that the "company would never allow the union to be formed here, no matter what it cost." The examiner also found that another vice president, Rivelis, told another pharmacist that the company "would never deal with the union" (J.A. 555a). None of this testimony was challenged or contradicted in any manner.

In addition to the findings of violation of §§ 8(a)(1) and 8(a)(3) in the discharge of pharmacist Nupp, the Board also upheld the trial examiner's finding as to the refusal to bargain after the demand of May 4, 1965, and in all other respects pertinent here, affirmed the lengthy and thorough opinion of the trial examiner.

The Court of Appeals, after affirming the Board as to the § 8(a)(1) violations as set forth above, and affirming without extended discussion the Board's finding as to the unlawful discharge of pharmacist Nupp, rejected the Board's finding of a violation of Section 8(a)(5). The Court never questioned the existence of a majority on May 4, and after, but said there was not substantial evidence to support the Board's finding of the employer's lack of a good faith doubt.

The Court, in its opinion, omitted any discussion of the extensive evidence found by the examiner and the Board to show lack of good faith doubt on the part of the employer except for two items, the findings of violations

of Section 8(a) (1) and the rejection of the union's request for an independent card check. The violations of Section 8(a) (1) were passed off as "not of itself sufficient reason to negative a good faith doubt," and further stated that "An 8(a) (1) violation without more is just as consistent with a disbelief in the majority status of the union as it is with a belief in the majority status."

The Union's request for a card check was passed off with the statement that the use of authorization cards was a "notoriously unreliable method of determining the majority status of a union," without any consideration of the facts and evidence surrounding the signing of the cards, the purpose for which the cards were signed, and the extensive employer knowledge of the continued campaign of the pharmacists to organize themselves into a union.

The Court devoted most of its discussion to a consideration of the reasons advanced by the employer as to why there was a good faith doubt as to the numerical majority of the union. The Court placed reliance upon testimony of one supervisor who stated that he had talked with some pharmacists who advised him that they did not think many were interested in the union, despite characterizations by the examiner, who observed the witness, that the supervisor was "unnecessarily evasive and vague about these conversations, incredibly testifying that he 'more or less listened to what they had to say about it' and that he 'didn't really do any questioning as to what took place.' "

The Court also placed reliance on the fact that the same union had made a written demand for recognition in early 1954 as bargaining agent for some of Lane's clerical employees, and had been defeated in a National

Labor Relations Board election. The Court also referred to the union's "hurry" in demanding recognition as a factor that the employer could take into account in establishing his good faith doubt. The Court also pointed to the so-called "slim margin" as another factor the employer could consider (even though the employer admitted that the union had 19 signed cards at a time when the union had exactly that number).

The Court also said that the union's demands did not clearly designate the stores or the pharmacists the union claimed to represent. This so-called "lack of clarity" was another reason for Lane to doubt the majority of the union. Then it stated that there were other questions of eligibility of inclusion of certain pharmacists in the unit, which was another factor the employer could rely upon. The Court even went so far as to point out that one of the pharmacists who was excluded as a supervisor had attended the organization meeting of April 28, and said "he must have been considered eligible to attend and participate in the union." This selective reading of the evidence, like much of the Court's evaluation, failed to take into account the actual fact that those attending the April 28 meeting were invited by fellow pharmacists, not by the union, and that the union's demand for recognition, which was made after the meeting, specifically excluded supervisors.

It was upon this recitation of the evidence that the Court rejected the Board's finding as not based upon substantial evidence.

REASONS FOR GRANTING THE WRIT.

I.

It may be confidently said that the most important issue in the administration of the National Labor Relations Act today involves the establishment of collective bargaining rights without an election under Section 8(a)(5) of the Act.[2] The number of cases decided by the Board has been rising steadily.[3] Legal writing on the subject has been extensive[4] and promises to continue to be even more so.

Much of the renewed importance of so-called card check cases in recent years has flowed directly from *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956), where this Court pointedly remarked that certification is not the only route to representation status. There is also this Court's ruling in *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944). As long as these doctrines stand as guiding beacons for the Board and the

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[2] We are indebted to Professor Lesnich's comprehensive article, Establishment of Bargaining Rights Without an NLRB Election, 65 *Mich. L. Rev.* 851 (1967), for his collection of the recent writings and controversies on the subject.

[3] Lesnich, *supra*, note 2, in which he states that his own study showed about a dozen such cases in 1964, twice that many the following year, and approximately 117 in 1966. The issue, with widely divergent results, has been before every one of the Courts of Appeals in substantial numbers. Counsel herein has studied more than fifty such cases in the various circuits since January 1, 1967 through April 30, 1968.

[4] For what Professor Lesnich fairly called a "diatribe" against reliance on authorization cards, see Comment, Union Authorization Cards, 75 *Yale L. J.* 805 (1966); see also, Card Checks and Employee Free Choice, 33 *U. Chi. L. Rev.* 387 (1966); Lewis, the Use and Abuse of Authorization Cards in Determining Union Majority, 16 *Lab. L. J.* 434 (1965); Loomis, Determination of Union Majority Status, 47 *Chi. Bar Record* 113 (1965); Sandler, Another Worry for Employer.

litigants who come before it, there will continue to be a plethora of authorization card cases which are, as we will undertake to show, being widely and differently construed by various courts of appeals to the confusion and consternation of both the Board and the litigants.

This Court's denial of certiorari during the October 1967 Term in *NLRB v. Crawford Manufacturing Co.*, ____ F.2d ____ (4th Cir. 1967), No. 1050; *Bryant Chucking Grinder Company v. NLRB*, ____ F.2d ____ (2d Cir. 1967), No. 1324; and in *Preston Products Company v. NLRB*, ____ F.2d ____ (D.C. Cir., 1967), No. 1367, may understandably result in some timidity on the part of future petitioners, including the Labor Board, in seeking review in authorization card cases. But this case is far different from the three set forth above, as there is no issue here of any unreliability concerning the cards, which was a major problem in all of those proceedings.

The thrust of this petition involves some complexities of the substantial evidence rule on the one hand, but on the other, reaches to a broad scope of issues that are inherent in most authorization card cases. Disposition of such cases by various courts of appeals in oddly variant and conflicting ways under the substantial evidence rule contributes to floundering and confusion, leaves judges and litigants continually confounded, and makes one who seeks enforcement of Board orders a player of a kind of legal Russian roulette.

Then, why, among the complexities and varieties of authorization card cases, is this one particularly suited for this Court's review?

II.

The variances in decisions between the reviewing courts of appeals is enormous. There has arisen a pronounced judicial hostility to the Board's authority in bargaining order cases. Judge Haynsworth, in his tour de force against authorization cards in *NLRB v. Logan Packing Company*, ____ F.2d. _____, 66 LRRM 2596, flatly stated, "It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a 'card check' unless it were an employer's request for an open show of hands. The one is no more reliable than the other. No thoughtful person has attributed reliability to such card checks." The Second Circuit, in *NLRB v. Flomatic Corporation*, 347 F.2d 774, 778, has branded a bargaining order as "strong medicine." The Court below cited *Flomatic, Logan*, a "notoriously unreliable method" phrase, and a series of other rulings rejecting Board bargaining orders in card check cases.

Growing judicial hostility[5] to what may be considered as "unreliable" and "strong medicine" makes the substantial evidence rule a pliable vehicle for setting aside

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[5] The Fifth Circuit, in recently refusing to enforce a Board bargaining order in *NLRB v. Southland Paint Company*, ___ F.2d ____, 68 LRRM 2169 (May 8, 1968), in commenting upon the Fourth Circuit's decision in *Logan Packing Company, supra*, claimed that the Fourth Circuit had taken the position that an employer is entitled to have a good faith doubt of a union's majority support when it is based on cards alone, except in the rare instance when the employer verifies the majority status himself and finds that it does in fact exist. The Fifth Circuit, in an opinion by Judge Wisdom, went on to say, "Although we find the arguments advanced in those opinions persuasive, at this time in this case it is unnecessary to go as far as the Fourth Circuit has gone." Judge Wisdom added a footnote 16 at this point, which said: "The Third, Eighth, Ninth and Tenth Circuits have not spoken recently on this issue, and in view of the rapid alterations in position in the recent cases, we do not rely on their earlier opinions."

a Board order when a reviewing court deems it advisable. What is substantial evidence to one reviewing court may be insubstantial to another. There may be even variances among different panels of the same Court of Appeals based upon who is sitting at the time.[6]

One needs only contrast the Ninth Circuit's ruling in *Retail Clerks Union, Local 1179 v. National Labor Relations Board,* 376 F.2d 186 (9th Cir. 1967), with that of the Second Circuit in *NLRB v. River Togs, Inc.,* 382 F.2d 198 (1967). The Ninth Circuit ordered the Board to compel an employer to bargain with the union with a majority of authorization cards where the employer's bad faith was established, not by commission of any unfair labor practices or unlawful attempts to undermine the union, but by a delay of a few days, which was found to be inconsistent with the "policy and purpose of Section 8(a)(5) of the Act and evidences employer rejection of collective bargaining principles." The Second Circuit found employer conduct of interference, interrogation, surveillance and threats no evidence of a lack of good faith doubt by the employer and refused to enforce the Board's bargaining order.

One may also compare the Tenth Circuit's ruling in *Furr's Inc. v. NLRB,* 381 F.2d 562, cert. den., 389 U.S. 840, where the Employer thought that the card majority was generated by union misrepresentation (but the bargaining order was enforced), with the Sixth Circuit's holding in *People's Service Drug Stores, Inc. v. NLRB,* 375 F.2d 551, or the Fourth Circuit's ruling in *NLRB v.*

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[6] For example, the Sixth Circuit enforced a Board order in *NLRB v. H & H Plastics Manufacturing Company,* ____ F.2d ____, 67 LRRM 2572 (Feb. 15, 1968), where judges different from those who sat on the instant case affirmed the Board's order on evidence that, from our review of that case, seems far less substantial than the undisputed facts in this case.

Crawford Manufacturing Co., ___ F.2d ___, cert. den., No. 1050, or *Logan, supra*, or a host of other cases, where employer misconduct was pronounced (where bargaining orders were not enforced).

To this point, we have asserted that the issue of bargaining based upon signed union authorization cards is the most important problem confronting the Labor Board and the courts in administration of the National Labor Relations Act at this time. Hostility to the Board's doctrines has produced a wide variety of appellate rulings, many of which are disposed of under the substantial evidence rule when this Court is understandably loath to disturb a lower court's supposed search of the record for substantial evidence, or lack of it. This, too, is a factor of considerable importance, as we shall set forth later.

III.

This case is particularly pertinent for review by this Court at this time because there are elements in it that should lead to a declaration of what is substantial evidence as a matter of law to support a Board order compelling an employer to bargain. This is, of course, applicable to the crucial situation when a majority is based upon authorization cards as against a contention that the employer had a good faith doubt of the existence of the numerical majority.

The Board, affirmed by the Court below, found that there was commission of such unfair labor practices in violation of Section 8(a)(1) as interference, restraint and coercion which were designed to undermine the Union's standing, status, or majority. This kind of interference may be contrasted with minimal violations which are not related to the Union's status and majority standing. The second important element in this case is that the

Union offered to establish its majority status before an impartial third party at a time when there was no question or no claim of any kind, nor was one ever raised, that the authorization cards were invalid or that their purpose was for any other reason than to establish the Union's right to bargain for the pharmacists. This issue is thus quite different from the 1967 term cases, where the controversy in all of them revolved around whether or not there was an existent majority because of misrepresentation or some cloud over the status of the cards. The first basic question here is whether, when these two factors are proved by substantial evidence on the record, as they were in this case, these combined factors are sufficient as a matter of law to meet the substantial evidence test to uphold a Board finding of a lack of good faith doubt.

There is even substantial authority for the proposition that violations of Section 8(a)(1), after a union has demanded recognition, are alone sufficient substantial evidence of a lack of good faith doubt on the part of the employer.[7] On the other hand, the Second Circuit in *River Togs, supra,* the Fourth Circuit in *Logan, supra,* and the Sixth Circuit in this case, have gone far to say that sub-

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[7] The First Circuit, through Chief Judge Aldrich, in *NLRB v. Purity Food Stores,* 354 F.2d 926 at 927, said: "By its clearly established 8(a)(1) violation it [the employer] is barred from asserting a good faith, although erroneous, doubt * * *." The Tenth Circuit, in *Furr's, Inc. v. NLRB,* 381 F.2d 562, Cert. den., 389 U.S. 840, made almost exactly the same holding. See also, *NLRB v. Southbridge Sheet Metal Works,* 380 F.2d 851 (1st Cir., 1967); *Lincoln Mfg. Co., v. NLRB,* ____ F.2d ____, 65 LRRM 2913 (7th Cir. 1967). The Fourth Circuit in *NLRB v. Overnite Transportation Co.,* 308 F.2d 279, at 283, through Judge Sobeloff, after referring to a course of employer conduct designed to violate Section 8(a)(1) after receiving a union demand for recognition, said: "This course of conduct is an absolute refutation of any good faith doubt on the part of the company." Judge Sobeloff's statement was regrettably rejected by Judge Haynsworth in *Logan, supra.*

sequent violations of Section 8(a)(1) of the Act are no evidence at all of a bad faith doubt by the employer as to the existence of a union majority.

The Board itself does not consider subsequent evidence of violations of Section 8(a)(1) as conclusive as to a lack of employer good faith doubt. Its definitive ruling in *Aaron Bros.*, 158 NLRB 1077, said: "Whether an employer is acting in good or bad faith in questioning a union's majority is a determination which of necessity must be made in the light of all the relevant facts of the case, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct."

Nor do we contend that Section 8(a)(1) conduct, regardless of its nature or gravity, is alone sufficient to support the finding of a lack of employer good faith doubt. We do believe, however, as the Tenth Circuit said in *Furr's, Inc., supra,* that "case law leaves no doubt that 8(a)(1) conduct is *cogent evidence* of a lack of good faith." (Emphasis supplied.) This is far different than saying, as the Second, Fourth and Sixth Circuits have done, that it is no evidence at all.

Thus, as a part of the substantial evidence standard, this Court can settle conflicts between the circuits and guide the Board and litigants by deciding whether evidence of Section 8(a)(1) violations which are designed to interfere with the Union's majority are either cogent evidence, some evidence, or no evidence at all tending to prove an employer's lack of good faith doubt.

But when the evidence of Section 8(a)(1) violations is added to the circumstances of a union request for an impartial third party card check, at a time when there is no question whatever raised as to the authenticity or purpose of the authorization cards, and this is rejected, then these

combined factors should establish as a matter of law the lack of employer good faith doubt. No court, until the Sixth Circuit in the case below, has ever rejected this composite of evidence as insufficient. The Eighth, Ninth, and Tenth Circuits have found these factors to be an unquestionable demonstration of an employer's lack of good faith doubt.

Perhaps the strongest statement of this principle has come in the Ninth Circuit's ruling in *NLRB v. Luisi Truck Lines*, ___ F.2d ___, 66 LRRM 2461 (9th Cir. 1967), when the Court said: "Even if Respondent has some doubt as to the majority status of a union, its entering upon an unlawful course of conduct in violation of Section 8(a)(1) and clearly directed at undermining whatever support the union had, as well as its failure to accept the union's offer of proof of its majority status, indicates that such doubt, if any, was not the key motivating factor in its refusal to bargain. To the extent that Respondent had any good faith doubts it apparently was not anxious to resolve them until such time as it could be sure that no matter what the proper unit was, the union would not have a majority."

The Eighth Circuit, in *NLRB v. Ralph Printing & Lithographing Company*, ___ F.2d ___, 65 LRRM 2800 (8th Cir., 1967), made substantially the same holding. There were violations of Section 8(a)(1) in the case, and a refusal of the employer to submit authorization cards to a mutually acceptable third party to verify the union's claim of a majority. The Court said: "Their failure to give the union any opportunity to substantiate its claims of representation is inconsistent with the assertion of good faith." See also, *NLRB v. George Groh & Sons*, 329 F.2d 265 (10th Cir. 1964).

The importance of an acceptable standard for establishing substantial evidence to prove as a matter of law

a lack of good faith doubt on the part of an employer as to a union's majority, along with the conflicts between the reviewing courts, make this issue in this case worthy of this Court's review.

IV.

The second question presented, once the underlying factual foundations of the inquiry are substantiated, provides a powerful example of a gross misapplication of the substantial evidence rule. Cf. *NLRB v. Walton Manufacturing Company*, 369 U.S. 404 (1962). The evidence found by the Board in this case to establish the employer's lack of good faith doubt is not only substantial, but indeed is overwhelming. We shall first set forth only the probative facts which are undisputed and uncontradicted. A short summary of these critical factors is:

(1) There was no question as to the validity and the purpose of the cards, which were signed solely for representation and bargaining purposes. The employer had extensive knowledge of this purpose.

(2) The employees organized themselves, and only sought union representation after they had conducted a considerable campaign of their own, which demonstrated their desire for collective bargaining.

(3) There was unremitting hostility toward the union not contradicted or denied. Pharmacists were told that the company would never allow a union to be formed, no matter what it cost.

(4) There was an adamant refusal to deal with the union, no matter what the circumstances. Rivelis, one of the vice presidents, told the pharmacists the company would never deal with the union.

(5) The critical admissions against interest of the employer's own knowledge of the fact that union represented a majority after the demand was made should, without any other evidence, be sufficient to meet any substantial evidence test as to proof of a lack of good faith doubt. The admissions by two supervisors that the union had 19 signed cards at a time when that was exactly the correct number, as found by the examiner and the Board, was never contradicted, nor was there ever any evidence introduced to even seek to controvert this critical factor.

(6) The refusal to accede to a card check when the only issue involved was whether or not there existed a numerical majority was likewise uncontradicted. Nor was there any reason assigned by the employer at that time as to a doubt (J.A. 501a).

(7) The employer sought time in which to dissipate the union's majority. Kaye, the operational vice president, in seeking to persuade pharmacist Maza to desert the union and work with the employer, told him that the cards didn't mean anything and with his help there was time to change the signatures.

All of these facts are probative toward the establishment of a lack of good faith doubt on the part of the employer. Not a single one of them was contradicted or sought to be impeached in any manner. Thus, there was no body of evidence directly opposed to detract from the force of this evidence, as contrasted to the situation in *Universal Camera, infra,* where the examiner and the Board reached different conclusions on the evidence and the reviewing court was permitted to take into account the examiner's finding which detracted from the evidence utilized by the Board.

The Court, in its findings, ignored every one of the above circumstances except the violations of Section 8 (a) (1) and the refusal of the employer to accede to a card check. The Court of Appeals in turn relied upon other factors which, when subjected to a more searching analysis than this petition permits, are almost totally wanting in substance. The Court relied upon testimony of one supervisor, which was discredited by the examiner who saw the witness, that some of the pharmacists had told him they did not believe there was much support for the union.[8]

The Court relied upon a 1954 event when the same union requested recognition as bargaining agent for drug store clerical employees, and was later rejected in a National Labor Relations Board election. Judge Sobeloff succinctly disposed of this kind of argument in *NLRB v. Overnite Transportation Company*, 308 F.2d 279, at 283, when he said: "A union's unsuccessful attempts at organizing other branches of a company's operation may not be relied upon by an employer to refuse at a different branch either to recognize a union or at least to undertake some inquiry into the actual extent of the union's representation."[9]

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[8] Another panel of the same Court discounted this kind of evidence in *NLRB v. H & H Plastics Manufacturing Company*, ____ F.2d ____, 67 LRRM 2573 (Feb. 15, 1968) where two employees out of a group of 23 recanted their union support.

[9] A similar argument was found insubstantial by the Seventh Circuit in *NLRB v. Richman Bros. Co.*, ____ F.2d ____, 67 LRRM 2051 (1967), where there was a long history of rejection of unions by employees of the employer throughout the nation. The Second Circuit in *Textile Workers Union v. NLRB*, ____ F.2d ____, 66 LRRM 2751 (1967), did give some weight to this factor, citing four other cases to support his proposition. The Court, however, paying heed to *NLRB Overnite Transportation Company, supra*, recognized that experience at *other* locations afforded a possible basis for distinction.

The Court below cited the union's hurried procedure in seeking recognition so quickly after the signing of the cards.[10] The Court also cited the slim majority of the union as another factor tending to establish the employer's doubt of majority.[11]

The Court below cited a lack of clarity in the union's demand, stating that the demands were made only to "Lane Drug Company." The three stores in the case not located inside the municipal limits of the City of Toledo were formed into separate corporations, such as Lane's of Bowling Green, Inc., Lane's of Sylvania, Inc., and Lane's of Oregon, Inc. Of course, the union had no way of knowing the intricate corporate structure of the operation, since all of the stores operated as Lane Drug Company, functioned as one unit, had the same officers and same supervisors, and were approximately alike in every respect save physical location.

The Court also cited the employer's doubt of the correct unit composition, apparently because of the question of supervisory status of some pharmacists and a question of whether a pharmacist named Searle was a supervisor or managerial employee.[12]

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[10] We fail to perceive how this can in any manner detract from the efficacy the union's majority claims. It might as easily be considered positive strength.

[11] Apart from the fact that an employer often might not know the numerical extent of the union's claim (although here the evidence is undisputed that the employer actually knew that the union represented a majority that was not slim), one needs only an actual majority—not an overwhelming majority, or a substantial majority, or even a decisive majority. The Third Circuit, in recently affirming the Board in *NLRB v. Quality Markets Inc.*, ____ F.2d ____, 67 LRRM 2034 (Dec. 18, 1967), where the majority was 11 of 21 employees, gave no consideration at all to this factor in evaluating the employer's claim of good faith doubt.

[12] The employer's own representation petition, sworn to by its counsel, that the unit contained only 25 eligible pharmacists,

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We come, then, to what is substantial evidence when the record is viewed as a whole, including the body of evidence opposed to the Board's view. As we have shown, there was no evidence at all opposed to the enumerated factors supporting the Board's finding. The Court, as a basis for its holding there was no substantial evidence, looked to factors altogether separate. Is this proper, when to "ascertain substantiality does not furnish a calculus of value by which a reviewing court can assess the evidence"? *NLRB v. Universal Camera Corp.*, 340 U.S. 474, at 488. Does taking into account the evidence opposed to the Board's view require that there be some conflicting evidence to specifically detract from that relied upon by the Board before a Board finding may be set aside? When undisputed Board evidence in and of itself is sufficient to sustain the inference of the fact in issue, does this not meet the test of substantiality?

Is this not a gross misapplication of the substantial evidence rule warranting review in and of itself? But is it not more important to re-state the principles of the rule in Section 8(a)(5) cases by defining what is meant

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which is likewise uncontradicted, should alone be dispositive of such a fragile claim. The Fourth Circuit has previously said, in *Florence Printing Company v. NLRB*, 333 F.2d 289, at 291: "Even if the company entertained a doubt, it is no defense to a refusal to bargain charge where the unit is proper." The Seventh Circuit said in the recent *Richman Bros.* case, *supra*, that: "Where the deviation between the unit requested by the union and the unit believed appropriate by the employer is insubstantial and does not affect the union's majority, it cannot justify the employer in refusing to bargain. (citing cases) A proper course for the employer in those circumstances is to refuse to bargain with respect to those employees whose unit status is disputed, not to wholly refuse to bargain." The First Circuit has said in *NLRB v. Primrose Super Market of Salem, Inc.*, 353 F.2d 675, at 676: "It seems entirely justifiable to rule that an employer who was improperly seeking to discharge unionization must take its chances as to the appropriateness of the proper unit."

by the weight to be accorded that body of evidence opposed to the Board's view?

V.

This Court's restatement of the substantial evidence rule in *Consolo v. Federal Maritime Commission*, 383 U.S. 607 (1966), and *Illinois Central Railroad Company v. Norfolk and Western Railway Company*, 385 U.S. 57 (1966) appears far from different from what was applied by the Court below, or other reviewing courts in Labor Board authorization card cases. In *Consolo*, at 383 U.S. 607, 620, substantial evidence was defined as that which "must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." In *Illinois Central*, at 385 U.S. 57, 69, this Court said again: "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."

If indeed, substantial evidence is that which must be enough to justify, if a trial were to a jury, a refusal to direct a verdict, is not a Board finding of the fact of a lack of good faith doubt on the part of an employer eminently substantial when the probative facts relied upon are undisputed and uncontradicted? Does this not warrant "sending the case to the jury"? Are not the examiner and the Board, where they are in agreement, the ultimate jury which must decide the fact when a reviewing court, as a matter of law, could not deny them that privilege?

The divergence from the standards of *Consolo* and *Illinois Central* by the reviewing court below makes reliance upon substantial evidence a hazardous game, and is a further reason why this case, on its powerful facts, merits this Court's review.

CONCLUSION.

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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